BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Application of Wavelength Internet, LLC for a Certificate of Public Convenience and Necessity to Operate as a Competitive Local Carrier ("CLC") in Order to Provide Resold and Full Facilities-Based Broadband Internet and Voice-Over-IP Service and Designation as an Eligible Telecommunications Carrier	)	Application No. A2101009

WAVELENGTH INTERNET, LLC (U 7403 C) APPLICATION FOR PARTIAL REHEARING OF DECISION 23-02-001 DENYING DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER

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Pursuant to Rule 16.1 of the Commission's Rules of Practice and Procedure, Wavelength Internet, LLC ("Wavelength") files this Application ("Application") seeking partial rehearing of Decision No. 23-02-001 ("Decision") denying Wavelength's request for designation as an Eligible Telecommunications Carrier ("ETC"). It is being filed within 30 days after the date the Commission mailed D.23-02-001 (February 3, 2023), and thus is timely filed.

As explained below, the Decision includes multiple material legal and factual errors, and Wavelength requests that the Commission grant rehearing to address them.

I. INTRODUCTION AND SUMMARY

The Commission found in D.23-02-001 that Wavelength is fully qualified from a managerial, financial and technical perspective to operate as a telecommunications carrier in California.[1] But the Commission denied ETC designation for Wavelength, in effect concluding that the public interest would be best served by prohibiting Wavelength from receiving $29 million in federal funding to support broadband infrastructure development in some of the most difficult-to-serve regions of California.

The Decision is based upon multiple material legal and factual errors.

First, the Decision makes a single finding of fact ("FoF") relating to Wavelength's ETC designation -- "Granting an ETC designation to Wavelength at this time is not in the public interest."[2] But the Decision failed to weigh Wavelength's ETC application in accordance with public interest factors that should be applicable to ETC evaluations, as specified in both FCC guidance and the Commission's own precedent. This core determination relating to Wavelength's

[1] Decision, at 32.
[2] Decision FoF #14, at 32.

ETC designation was made arbitrarily and in a manner contrary to applicable authority. It is an arbitrary and capricious determination, amounting to material legal error.

Second, the Decision disregards crucial evidence in the record, relies heavily on evidence *not* in the record, and reaches a conclusion contrary to the record. The Decision ignores or misstates documents and information submitted by Wavelength, without any contrary evidence. The Decision was based on speculation by the Commission, not upon the record, nor even upon reasonable inferences drawn from the record. This is contrary to Commission precedent, and violates Wavelength's due process rights.[3] The Decision therefore constitutes legal error because it fails to base its decision on the record as required by Section 1757.1(a)(4).[4]

Third, Wavelength met its burden of proof. Wavelength's request for ETC designation was unopposed, and no party submitted contradictory evidence. In its scoping memo, the ALJ determined that the matter presented no material issue of fact, and thus no hearing was required.[5] At no time prior to the issuance of the Proposed Decision did the Commission indicate that any material issues of fact existed, or that there was any question as to Wavelength's ETC designation. Wavelength presented ample evidence in the record demonstrating its capability to meet its RDOF obligations, including all of the information provided to the FCC to enable the FCC to decide whether to authorize Wavelength for RDOF support. The Commission, however, supplanting the FCC's evaluation, relied on speculation, conclusory statements, and extra-record evidence to conclude that California would be better off not receiving $29 million in federal funding for broadband infrastructure development. The preponderance of the evidence indicates that the public interest is better served by granting ETC designation to Wavelength.

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3 Cal. Pub. Util. Code Section 1757.1(a); *see also* D. 10-12-064.
4 Cal. Pub. Util. Code Section 1757.1(a)(4).
5 ALJ Scoping Memo, at p. 2.

The Decision also relies upon multiple material errors of fact.

First, the Decision ignored detailed evidence provided by Wavelength in support of its per-location cost estimates. Relying solely on extra-record evidence, the Decision *speculates,* without reference to any evidence, that Wavelength's project *may* cost more than Wavelength's projections reflect.[6] That is an insufficient basis from which to reject the evidence in the record.

Second, the Decision mistakenly concludes that granting ETC designation to Wavelength would foreclose future funding availability.[7] As Wavelength explained in detail in its Opening Comments, this is simply not the case.[8]

Third, the Decision's "public interest" analysis ignores crucial facts. In particular, the Decision fails to account for perhaps the most important public interest factor of all: Wavelength's RDOF deployment would bring broadband service to remote, unserved areas of California that desperately need it. Even given the Commission's apparent qualms about Wavelength's ability to meet its RDOF deployment obligations, the Decision fails to explain how or why those reservations should outweigh the opportunity to bring broadband infrastructure to those who need it most (and using federal money to do so). The Commission also could have addressed such concerns by making Wavelength's ETC designation conditional upon its compliance with RDOF deployment requirements, as the Commission has done for other RDOF ETC applicants, and as Wavelength itself has suggested.

II. LEGAL STANDARDS

A. Requirements for Applications for Rehearing

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6 *See* Decision, at 22.

7 Decision, at 25.

8 Wavelength Internet, LLC Comments on Proposed Decision filed November 3, 2022 ("Wavelength Comments to PD"), at 6.

Applications for rehearing of a Commission order or decision may be made by a party within 30 days of the date the Commission mails the order or decision.[9] The purpose of an application for rehearing is to alert the Commission as to errors in a decision, so that the Commission may correct the errors expeditiously.[10] Ambiguity as to the basis for any decision can be sufficient grounds for rehearing.[11]

B. The Commission Must Not Act in an Arbitrary or Capricious Manner.

The Commission must not act in an arbitrary or capricious manner in reaching decisions, and must proceed in a manner required by law.[12] The Commission must apply its rules and laws to all parties in a non-discriminatory manner.[13]

C. Commission Decisions Must be Based on the Record.

Commission decisions must be based on the record in the proceeding.[14] Its conclusions must be supported by factual findings based on evidence.[15]

D. As a Ratesetting Proceeding, the Evidentiary Standard is Preponderance of the Evidence.

Wavelength's application for ETC designation is a ratesetting proceeding.[16] The evidentiary standard in a ratesetting proceeding is preponderance of the evidence.[17]

E. The Commission Must Provide Due Process.

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9 Rule 16.1(a), 16.2(a).
10 Rule 16.1(c) of the Commission's Rules of Practice and Procedure.
11 *See* D.10-05-052.
12 Cal. Pub. Util. Code Section 1757.1(a).
13 Cal. Const. Art. I § 7.
14 Cal. Pub. Util. Code Section 1757.1(a)(3).
15 Cal. Pub. Util. Section 1757.1(a)(4).
16 Resolution ALJ-3479 and Scoping Memo.
17 D.12-12-030, at 44.

The Commission must provide due process in its decisions.[18] Due process requires that the Commission make findings in decisions that are "specific enough to enable the court to review intelligently the decision of the commission and ascertain if the facts on which the commission has based its order afford a reasonable basis for it."[19] An agency cannot base a decision upon "arbitrary or extralegal considerations."[20] "[A] mere conclusion" is not sufficient; rather an agency decision must include findings that are "specific enough to enable the court to review intelligently the decision of the commission and ascertain if the facts on which the commission has based its order afford a reasonable basis for it."[21] Without such basis, an agency order is void.

III. D.23-02-001 IS BASED ON MATERIAL LEGAL ERROR.

A. D-23-02-001's Rejection of Wavelength's ETC Designation Conflicts With Both FCC Guidance and Commission Precedent.

D.23-02-001 makes thirteen separate Findings of Fact in support of its grant of CPCN authority to Wavelength. As to its rejection of Wavelength's ETC designation, however, it makes only one: FoF #14 simply states, "Granting an ETC designation to Wavelength at this time is not in the public interest."[22]

As explained below, the Decision applied the "public interest" test in a manner inconsistent with FCC guidance as well as Commission precedent. The Decision focused entirely – and improperly – on supposed concerns about Wavelength's ability to meet its RDOF deployment

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18 Cal. Const. Art. I § 7.

19 *Saginaw Broadcasting v. FCC,* 96 F.2d 554, 559 (D.C. Cir. 1938), *cert. den. sub. nom Gross v. Saginaw Broadcasting Co.* 305 U.S. 613 (1938).

20 *Id.*

21 *Id.,* at 561, quoting *Kewanee & G. Ry. Co. v. Illinois Commerce Comm.,* 340 Ill. 266, 269-70 (Ill. 1930).

22 Decision, at 32.

obligations, without weighing such concerns against the manifest public benefits of Wavelength's proposed deployment.

In fact, the Decision's extensive review of Wavelength's ability to meet its RDOF obligations is itself an overreach. The Decision supplants the Commission's own judgment in place of the FCC's review of RDOF applicants, effectively foreclosing the FCC's central role in the RDOF evaluation process. The Decision cites to multiple sources that supposedly support the Commission's authority to delve into Wavelength's ability to meet its RDOF buildout obligations, but a close read of the cited sources reveals that they do not actually support the Decision's approach.[23]

The Decision relies upon CPUC Resolution T-17002 for the notion that the Commission should conduct a detailed examination of whether an ETC applicant is capable of providing the services for which universal service support is sought.[24] Resolution T-17002 does in fact state that an ETC applicant must demonstrate that it has the "commitment *and ability*" to provide the services supported by the federal universal service mechanism.[25] From the words "and ability," the Commission has apparently concluded that it can and should embark on a detailed inquiry into an ETC applicant's capabilities. Indeed, the words "and ability" are the *only* indication within T-17002 suggesting that the Commission should evaluate an ETC applicant's capability to comply with support obligations.

The phrase "commitment and ability," however, comes directly from a 2005 FCC Order (FCC 05-46), in which the FCC encouraged states to adopt certain requirements as part of their

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23 *See* Decision, at 20, fn 21, 22, 23.

24 Decision, at 20.

25 *Id.* (emphasis added); CPUC Resolution T-17002, Appendix A, Section II.

ETC evaluations.[26] Indeed, the purpose of Resolution T-17002 was to adopt FCC guidelines for ETC designation, as set forth in FCC 05-46. As such, the phrase "commitment and ability" must be considered in the context of its usage in FCC 05-46.

And in context, the FCC's guidelines do *not* suggest that the Commission may properly embark on a broad inquiry such as that undertaken in Wavelength's case. FCC 05-46 provides (emphasis added):

> We adopt the requirement that an ETC applicant must demonstrate its *commitment and ability* to provide supported services throughout the designated service area: (1) by providing services to all requesting customers within its designated service area; and (2) by submitting a formal network improvement plan that demonstrates how universal service funds will be used to improve coverage, signal strength, or capacity that would not otherwise occur absent the receipt of high-cost support.[27]

This passage makes clear that the FCC's "commitment and ability" guidance is in fact fairly limited. The Decision's conclusion that FCC 05-46, and T-17002, gives *carte blanche* authority to conduct a detailed, overarching review of an ETC applicant's ability to meet its support obligations is misplaced.

In fact, the FCC *specifically declined* to adopt a recommendation that a state should evaluate separately whether ETC applicants have the financial resources and ability to provide quality services throughout the designated service area: "We decline to adopt the Joint Board's recommendation that an ETC applicant demonstrate that it has the financial resources and ability to provide qualifying services throughout the designated service area."[28] The Decision, though, does just the opposite, relying *entirely* on conclusions about Wavelength's financial ability and

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26 *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order, FCC 05-46, released March 17, 2005 ("FCC 05-46").

27 FCC 05-46, at ¶ 21.

28 FCC 05-46, at ¶ 2.

ability to provide qualifying services in its determination that ETC designation for Wavelength would not be in the public interest.

Moreover, FCC 05-46 also included a public interest analysis to be applied in the case of ETC designations – and that was cited in T-17002 – but which the Decision utterly ignored. The FCC stated that the public interest analysis should:

> [I]nclude an examination of (1) the benefits of increased consumer choice, (2) the impact of the designation on the universal service fund, and (3) the unique advantages and disadvantages of the competitor's service offering…. We encourage state commissions to require ETC applicants over which they have jurisdiction to meet these same conditions and to conduct the same public interest analysis outlined in this Report and Order. We further encourage state commissions to apply these requirements to all ETC applicants in a manner that is consistent with the principle that universal service support mechanisms and rules be competitively neutral.[29]

To emphasize, the Commission cited these FCC public interest factors in T-17002,[30] but Decision ignored them altogether.

The FCC also included the following additional factors, which the Commission has previously used as the measure for determining whether an ETC designation is in the public interest,[31] but which, again, were entirely ignored in the Wavelength Decision:

> The public interest benefits of a particular ETC designation *must be analyzed* in a manner that is consistent with the purposes of the Act itself, including the fundamental goals of preserving and advancing universal service; ensuring the availability of quality telecommunications services at just, reasonable, and affordable rates; and promoting the deployment of advanced telecommunications and information services to all regions of the nation, including rural and high-cost areas.[32]

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29 FCC 05-46, at ¶ 18.

30 T-17002, Appendix A, Section G ("Public Interest Determination")

31 *See* CPUC Resolution T-17735.

32 FCC 05-46, at ¶ 40 (emphasis added).

The Decision took none of these factors into account with respect to Wavelength's ETC designation. Instead, the Decision latched on to concerns about Wavelength's ability to meet its RDOF obligations (which, as noted above, is itself inconsistent with the FCC's foundational guidance in FCC 05-46), and based its "public interest" determination solely on those concerns, without qualification or consideration of countervailing factors.[33] Inexplicably, the Decision held that granting Wavelength's *CPCN* application "will benefit the public interest by expanding the availability of technologically advanced telecommunications services within the state."[34] But for purposes of Wavelength's ETC designation, the Commission completely ignored this and other key public benefits.

The fact that Wavelength promised to bring advanced broadband infrastructure to California residents that desperately need it – using $29 million of federal funding support – was seemingly of no import whatsoever to the Commission.

In short, the Decision's sole Finding of Fact relating to Wavelength's ETC designation mistakenly employs a "public interest" measure that it should not have (a judgment about Wavelength's ability to meet its RDOF service obligations), while ignoring multiple other public interest factors that FCC guidance and Commission precedent make clear should have been part of the evaluation. The Decision's key finding amounts to a critical legal mistake, and is arbitrary and capricious. The Commission should grant rehearing to remedy the problem and approve Wavelength's ETC designation.

B. D.23-02-001 Relies on Evidence Not in the Record.

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33 The Decision's conclusion about Wavelength's ability to meet its RDOF obligation is itself questionable and grounded largely in extra-record evidence, as discussed in Section IV.A. below.

34 Decision, at 11.

The Decision denies Wavelength's ETC designation despite the lack of any evidence in the record contradicting Wavelength's showing that its plans for deployment of its fixed wireless network are technically and financially sound.

In support of its technical and financial conclusions, the Decision relies heavily on a single publication by the Benton Institute for Broadband & Society that was not made part of the record.[35] In fact, the Decision's reference to the Benton paper was the first time it had been brought up in the Wavelength matter. It was not mentioned in the Proposed Decision, nor at any prior point that would enable Wavelength to review the source and evaluate its credibility as applied to Wavelength's proposed network.

Moreover, reliance on the Benton paper is improper because the report offers commentary on fixed wireless as a general matter, not the specific deployment proposed by Wavelength. The Decision offers no rationale as to how the Benton paper's conclusions would in fact apply to Wavelength's proposed deployment. The Decision takes generic statements in the Benton report, and posits that its conclusions "could" or "may" apply to Wavelength's deployment. But the Decision never directly addressed Wavelength's deployment plan.

The Decision's reliance on the Benton paper is thus material legal error because the Benton Institute report is not in the record of this proceeding, and it violates parties' due process rights to rely on extra-record evidence.[36]

C. Wavelength Met its Burden of Proof.

Because this is a ratesetting proceeding, Wavelength must demonstrate that it satisfies the requirements for ETC designation by a preponderance of the evidence. Preponderance of the

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35 Decision, at 23-24.

36 *Southern California Edison v. Public Utilities Commission,* 140 Cal.App.4th 1085 (2006).

evidence is defined as "such evidence, when weighed with that opposed to it, has more convincing force and the greater probability of truth."[37]

Wavelength's CPCN/ETC application was unopposed. No evidence was submitted into the record opposing Wavelength's affirmative case, and the Decision cites to no evidence in the record that contradicts Wavelength's assertions.

Accordingly, Wavelength necessarily satisfied its burden of proof, and rehearing should be granted so that the Commission can modify D.23-02-001 to grant Wavelength's ETC designation request.

IV. D.23-02-001 IS BASED ON MATERIAL FACTUAL ERROR.

As noted previously, the Decision makes only a single Finding of Fact with respect to the ETC determination: FoF #14, which states that "Granting an ETC designation to Wavelength … is not in the public interest."[38] The body of the Decision includes numerous material factual errors upon which the Decision apparently relied to reach that conclusion.

A. D.23-02-001 Improperly Disregards Detailed Evidence in the Record Supporting Wavelength's Cost Estimates.

Despite extensive and detailed evidence in the record supporting Wavelength's per-location cost estimates, the Decision relies on conclusory and speculative statements – wholly unsupported by the record – to conclude that the cost to deploy Wavelength's fixed wireless network in rural California "may be significantly more" than a fiber optic network.[39] The Decision cited to no evidence in the record, provided no fact-based analysis to support its conclusion, and offered no rationale or explanation whatsoever as to how Wavelength's detailed cost estimates are

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37 *See* D.12-12-030, at 44.
38 Decision, at 32.
39 Decision, at 22.

inaccurate. That is most likely because, in the extremely rural, remote, sparsely populated region Wavelength proposes to serve, the Decision's contention that fiber would cost less than fixed wireless is manifestly untrue.

B. D.23-02-001 Mistakenly Concludes that Unlicensed Fixed Wireless Service Would Foreclose Future Funding Availability.

As previously explained by Wavelength in this matter, Wavelength's receipt of RDOF support to deploy broadband infrastructure to unserved locations in California will not remove those locations from future funding availability under known federal and state broadband support programs.[40]

While the Decision places less emphasis on this issue than the Proposed Decision did, the Decision still repeats the mistaken concern that the locations could be removed from future funding availability, and presumably relied on this mistake as part of its "public interest" analysis.

C. D.23-02-001's "Public Interest" Evaluation Ignores Crucial Facts.

The Decision improperly evaluates Wavelength's ability to satisfy its RDOF deployment obligations, and relies upon extra-record evidence (while ignoring key evidence actually *in* the record) in questioning Wavelength's financial and technical plans. The Decision then reaches its ultimate conclusion: that the public interest would be best served by prohibiting Wavelength from even attempting to deploy broadband facilities to unserved locations in California.

The Decision utterly fails to explain how the public is best served by denying Wavelength the opportunity to try. As explained above, the Decision does not mention, much less consider, multiple factors that are supposed to be part of an ETC "public interest" determination, as set forth in T-17002 and FCC 05-46.

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[40] Wavelength Comments to PD, at 6-7.

Instead, the Decision simply concludes that Wavelength might not deploy its network as required under the RDOF program. And that, apparently, is the end of the story from the Commission's perspective.

Any proper consideration of the public interest, however, must take into account the potential benefits of the initiative. Wavelength's RDOF project in Southern California would address an immediate need for broadband infrastructure and service in some of the most challenging environments in California. The Decision fails to acknowledge the potential benefits of Wavelength's planned deployment at all, and fails to take them into account as part of its public interest evaluation.

Nor does the Decision explain how, exactly, the public interest would be detrimentally affected in the event Wavelength does not meet its RDOF obligations. Simply put, what is the downside of enabling Wavelength to proceed? The Decision does not answer this question, and did not articulate any cognizable reason other than a concern about Wavelength's ability to satisfy its RDOF obligations. As noted previously, though, and as FCC and Commission precedent reflect, whether Wavelength is deserving of RDOF support is a question for the FCC, not the Commission.

Even so, the Decision could have addressed any concerns about Wavelength's compliance with RDOF requirements, while still granting Wavelength's ETC designation. Other RDOF-related ETC designations granted by the Commission have included an Order provision stating that, if the provider failed to satisfy RDOF support requirements, that ETC designation would be revoked.[41] The Decision's central argument for denial of ETC is based upon supposed concerns with Wavelength's ability to satisfy its RDOF obligations. Why, then, would the Commission not

[41] CPUC Resolution T-17735, at 14; Starlink Proposed Decision, at 21; *see* Wavelength Comments to PD, at 13.

do what it has done with other ETC applicants, and grant Wavelength's ETC designation subject to a condition that it must satisfy its RDOF obligations?

The Decision fails to engage in an honest appraisal of the public interest, which is central to its conclusion denying Wavelength's ETC designation. The Commission should grant rehearing to address this issue and should grant Wavelength's ETC designation.

V. CONCLUSION

For the foregoing reasons, Wavelength's Application for Partial Rehearing should be granted, and Wavelength's application for ETC designation should be approved.

Respectfully submitted,

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